

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

- - -

BLAKE J. ROBBINS, et al. : CIVIL ACTION NO. 10-665
:
v. : Philadelphia, Pennsylvania
: February 22, 2010
LOWER MERION SCHOOL DISTRICT, : 2:33 o'clock p.m.
et al. :
.

HEARING
BEFORE THE HONORABLE JAN E. DUBOIS
UNITED STATES DISTRICT COURT SENIOR JUDGE

- - -

APPEARANCES:

For the Plaintiff: MARK S. HALTZMAN, ESQUIRE
STEPHEN LEVIN, ESQUIRE
FRANK SCHWARTZ, ESQUIRE
Lamm Rubenstone LLC
3600 Horizon Boulevard, Suite 200
Trevose, PA 19053

For the Defendant: HENRY E. HOCKEIMER, JR., ESQUIRE
PAUL LANTIERI, III, ESQUIRE
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103

ALSO PRESENT: WITOLD WALCZAK, ESQUIRE
(Via Telephone) American Civil Liberties Union

- - -

Audio Operator: Jeff Masiak

Transcribed by: Grace L. Williams, CET

(Proceedings recorded by For The Record Gold digital sound
recording; transcript provided by AAERT-certified
transcriber.)

- - -

Laws Transcription Service
48 W. LaCrosse Avenue
Lansdowne, PA 19050
(610) 623-4178

1 (The following occurred in open court at 2:33
2 o'clock p.m.):)

3 THE COURT: Good afternoon, everyone. Please be
4 seated.

5 COUNSEL: Good afternoon, your Honor.

6 THE COURT: I call the case of Blake J. Robbins, a
7 minor, by his parents and natural guardians Michael E.
8 Robbins and Holly S. Robbins, individually and on behalf of
9 all similarly situated persons, plaintiffs, against Lower
10 Merion School District, the Board of Directors of the Lower
11 Merion School District and Christopher W. McGinley,
12 superintendent of Lower Merion School District, defendants.

13 I scheduled a hearing today on plaintiffs' motion
14 for issuance of an emergency temporary restraining order
15 pursuant to Federal Rule of Civil Procedure 65. And I
16 understand there have been some negotiations between the
17 parties with respect to the form of an order.

18 Is the plaintiffs' side ready to proceed?

19 MR. HALTZMAN: Yes, your Honor, Mark Haltzman on
20 behalf of Blake Robbins, his parents, and if class
21 certification is granted, on behalf of all the other parents
22 and children in the school district who were issued laptops.

23 THE COURT: Fine. Mr. Haltzman, will you introduce
24 co-counsel, please?

25 MR. HALTZMAN: Sure. I have Steve Levin from my

1 office.

2 MR. LEVIN: Good afternoon, your Honor.

3 THE COURT: Good afternoon.

4 MR. HALTZMAN: And I have Frank Schwartz of my
5 office.

6 MR. SCHWARTZ: Good afternoon.

7 MR. HALTZMAN: And also is John Steinbach who is our
8 forensic expert who might be needed to maybe enlighten the
9 Court as to what we're seeking and why we need it.

10 THE COURT: Thank you, Mr. Haltzman.

11 Is the defense ready to proceed?

12 MR. HOCKEIMER: Yes, good afternoon, your Honor.

13 THE COURT: Good afternoon.

14 MR. HOCKEIMER: I am Hank Hockeimer, I'm from the
15 law firm of Ballard Spahr. I'm representing the defendants
16 in this matter. With me is my colleague, Paul Lantieri. And
17 also who has entered an appearance who is unfortunately out
18 of the country is my colleague Arthur Makadon. And we're
19 ready to proceed, your Honor.

20 THE COURT: Fine. Just before the hearing I
21 received a motion from ACLU, a motion for leave to file brief
22 as amicus curiae in support of issuance of injunction.

23 And Mr. Walczak of the ACLU is on the telephone
24 connection. Can you hear us, Mr. Walczak?

25 MR. WALCZAK: Yes, your Honor, good afternoon.

1 Is there any objection to that motion for leave to
2 participate in this proceeding by filing of the brief that is
3 appended to the motion?

4 MR. HALTZMAN: Your Honor, no, Blake Robbins and the
5 plaintiffs have no objection and welcome his coming into the
6 case.

7 MR. HOCHEIMER: Your Honor, I, unfortunately, I just
8 got this before we came over to court. I haven't had a
9 chance to look at it. I certainly have no objection to him
10 participating in this hearing but again I haven't read the
11 whole motion.

12 THE COURT: Well, what it seeks in essence is leave
13 to file the brief as amicus curiae in support of the issuance
14 of the injunction and nothing more. And he -- there is one
15 statute that the ACLU cites that is not, I don't think it's
16 cited in plaintiffs' papers, it's Title 3 of the Omnibus
17 Crime Control and Safe Streets Act of 1969.

18 MR. HOCHEIMER: It's the wiretap statute.

19 THE COURT: Yes.

20 MR. HOCHEIMER: Your Honor, we don't object then.

21 THE COURT: Fine. That means you're insofar as this
22 hearing is concerned, Mr. Walczak, and I gather that's all
23 you request, is that correct?

24 MR. WALCZAK: Yes, your Honor. We certainly
25 appreciate the Court allowing us to sit in on this.

1 THE COURT: Well, I've read your brief and I'm
2 certain counsel will read them as well. It's, well, there
3 really are two, there's a motion and a brief although the
4 defense side has not yet had an opportunity to read them.

5 In any event, I will give them an opportunity to
6 read your submissions before I rule on the case. To the
7 extent there's disagreement, there might not be any
8 disagreement and I say that because of the letter that I
9 received from -- let me just see who signed it -- Mr.
10 Hockeimer. It was delivered just a short time ago. And of
11 course the plaintiffs' side seen that letter, Mr. Haltzman?

12 MR. HALTZMAN: Yes.

13 THE COURT: You've seen --

14 MR. HALTZMAN: I actually only received it right
15 here today. I got it --

16 THE COURT: By here today you mean in the courtroom?

17 MR. HALTZMAN: In the courtroom, yes. I got a text
18 message that it was on my way but my cellphone was unable to
19 open up his PDF.

20 THE COURT: Do you have it now?

21 MR. HALTZMAN: I have it now, yes.

22 THE COURT: Have you read it?

23 MR. HALTZMAN: I have.

24 THE COURT: Have you read the proposed order
25 appended to the letter?

1 MR. HALTZMAN: I have. We had seen that previously,
2 correct.

3 THE COURT: All right. What is the position --
4 well, have you discussed the areas of disagreement? I guess
5 we ought to start there.

6 MR. HALTZMAN: Well, I'd like -- yes, we did and
7 just before your Honor came out, as is my policy. I try to
8 work things out, if possible, to avoid the court time and
9 expense.

10 THE COURT: Have you had enough time? Because --

11 MR. HALTZMAN: Well, your Honor, I think there's --
12 we have agreed on what I think in theory on at least some of
13 the issues. The major disagreement between what defense
14 would like and what we would like to have is we believe the
15 Court should enter an injunction. They don't want it called,
16 they don't want it to be called an injunction, they just want
17 some sort of order.

18 And the other big disagreement that we have is,
19 relates to they want the ability to continually update
20 software, update computers without having any restraints upon
21 that. And as our forensic expert will say if need be, that
22 could easily wipe out the evidence if it hasn't already been
23 wiped out but it could wipe out the evidence that we need to
24 show that a laptop has been activated by their peeping Tom
25 software to sort of be able to open up their screens.

1 We're hoping that there's going to be a trail left
2 on the individual laptops. So in addition to the laptops
3 that's being linked to actually accessing, we want to see
4 which other ones have been accessed.

5 THE COURT: Have you discussed with your forensic
6 expert and the defense side a way in which the computers can
7 be kept up to date and used while this litigation proceeds?

8 MR. HALTZMAN: Well, again, we don't even know for
9 sure what software they're using. The only reason we have
10 any idea what software they may be using is because the
11 Internet nowadays, everybody's been posting everything about
12 what supposedly the school district is using.

13 But we need our forensic guy to be able to get in
14 there and we can go there tomorrow, take a look at their
15 computer, the server, get some idea of what software they're
16 using. And, as I explained to them, if our forensic guy says
17 okay, based upon the software they're using and now we
18 understand what they're using, you doing a security update on
19 the computers for a virus won't affect anything, we're fine
20 with it.

21 But we need a chance before I say yes I need a
22 chance to allow our forensic guy to go in, see what they're
23 using and then know then what we're going to do. Otherwise,
24 if they have the right to do updates, tomorrow morning,
25 Judge, there's going to be this update that's going to go to

1 everybody and it could wipe out everything.

2 THE COURT: Well, you've used the word "could" wipe
3 out. They're, I've had considerable litigation involving
4 what you can do with computer hard drives and it's, quote --
5 and your forensic specialist will, I'm sure, agree, it's very
6 difficult to, quote, "eliminate everything."

7 MR. HALTZMAN: Correct, but there's a --

8 THE COURT: Pressing the delete button doesn't begin
9 to do that, as you know by now.

10 MR. HALTZMAN: Well, for instance, a security update
11 or an update on the software they're using could tell the
12 software to wipe out its log that it may have standing on
13 each of the computers. So it could be instructed to wipe out
14 the log. Or it could overwrite those sections of --

15 THE COURT: Overwriting, well, if you overwrite
16 certainly you will wipe out.

17 MR. HALTZMAN: Right. And sometimes I don't -- I
18 don't know enough and that's why we hired these forensic
19 experts to know whether a Microsoft update will start
20 overwriting those sections that we need to get.

21 That's why, you know, I'm confident that within a
22 week we'll be, if we can get in there tomorrow or the next
23 day, I will be able to say to defense counsel we have no
24 worries about any of these types of updates, go ahead and do
25 them because we've gotten to see what's there. Or come back

1 to this Court and say this is what evidence we have but they
2 can't do this, this or this update because this is the effect
3 it would have.

4 So that's just really, I just need, I need a window
5 to protect what evidence may be there.

6 THE COURT: Thank you.

7 MR. HOCHEIMER: Your Honor, may I just add or at
8 least--

9 THE COURT: You can do more than that.

10 MR. HOCHEIMER: Yeah, I probably won't add anything
11 to --

12 THE COURT: Well, I think what we're going to end up
13 doing is issuing an order. We'll talk further about whether
14 it should be, quote, "an order," or, quote, "an injunction."
15 But the effect will be the same, number one.

16 MR. HOCHEIMER: Absolutely.

17 THE COURT: Number two, it sounds like with respect
18 to your request to update the computers that more time is
19 needed and that if I issue an order today, a complete
20 standstill order today prohibiting you from doing that, that
21 would be subject to reconsideration quickly as soon as the
22 forensic specialist for the plaintiff has an opportunity to
23 examine the computers.

24 MR. HOCHEIMER: May I just address that point?

25 THE COURT: Absolutely.

1 MR. HOCHEIMER: We have one thing we reached common
2 ground on before we -- before we came before your Honor today
3 was that we have agreed and we would do this anyway to
4 preserve all electronic evidence and other data that would be
5 relevant to this case. So the concern about updating
6 something that could result in wiping out data, that would
7 violate our commitment to preserve the data, number one.

8 And, number two, we also have retained a company,
9 Help Free Communications, they're a large computer forensic
10 computer security company. As we speak they're on site now
11 preserving data. They are former FBI agents, former
12 Department of Defense security experts, they're at our
13 facility now ensuring that these kinds of things don't
14 happen.

15 If there are updates the updates would be to prevent
16 viruses, to continue to enable the students to productively
17 use these laptops in their education. We're certainly not
18 looking to do anything that would impact or delete in any way
19 evidence that's relevant to this case.

20 I mean we're trying to figure out, we were brought
21 in as a firm on Friday, we're trying to figure out what
22 happened here and we're conducting that investigation. But
23 we need time for our own experts to evaluate the hardware and
24 the software being used at Lower Merion. Within the interim
25 nothing will be destroyed that directly or indirectly is

1 relevant to these matters.

2 THE COURT: Well, I'm looking at your order or your
3 proposed order but I also, I want to try to dovetail the
4 language with the relief sought in the motion for temporary
5 restraining order.

6 MR. HALTZMAN: Your Honor, if I may, can I pass up
7 our form of order that we had prepared based upon their form
8 of order which incorporates some of their language with more
9 detailed language so that we could be working off the same
10 drafts?

11 THE COURT: Have you given Mr. Hockeimer a copy of
12 that draft?

13 MR. HALTZMAN: Oh, yes, absolutely.

14 THE COURT: Yes, that would be good. Now I'm
15 working from three drafts, the draft that was submitted by
16 letter or --

17 MR. HALTZMAN: It would be two. The draft that they
18 submitted by letter, your Honor, was the draft that they
19 forwarded over to me which I then sent back to them saying
20 this is our version based upon, take out on theirs but
21 expanding upon it.

22 THE COURT: All right, then I need not go to your
23 actual motion in the proposed order.

24 MR. HALTZMAN: Correct, only on two drafts, not the
25 order.

1 THE COURT: Thank you.

2 MR. HALTZMAN: May I approach the bench?

3 THE COURT: Yes. How many copies do you --

4 MR. HALTZMAN: I have other copies.

5 THE COURT: A copy for my clerk would be
6 appreciated. My clerk is this young woman in the middle.

7 (Pause.)

8 THE COURT: Have you had an opportunity to study
9 what was just submitted to me, Mr. Hockeimer?

10 MR. HOCKEIMER: Yes, your Honor, I have.

11 THE COURT: All right, let's, well, I guess the
12 threshold question is -- well, it's not a threshold question
13 because the plaintiffs have agreed to the stipulation and
14 order format that you proposed.

15 MR. HOCKEIMER: Well, I think Mr. Haltzman, and I
16 don't want to speak for him, but before we got in here he
17 wanted to add a few things at the end regarding the remedies
18 that would be available.

19 THE COURT: Regarding?

20 MR. HOCKEIMER: If there was a violation of the
21 order he would want to add something relating to the
22 remedies, is that correct?

23 MR. HALTZMAN: We, in addition to this, we had
24 provided a one page which said the Court hereby enters an
25 injunction based upon the hearing subject to the terms of the

1 stipulation and order.

2 And my concern was that their language here, I
3 wanted to make sure that if we were to go through this
4 language and we were working something out there would be
5 another paragraph that would be added that says that any
6 violation of this order shall be subject to contempt and
7 reasonable attorneys fees awarded as a result of violations.

8 THE COURT: Isn't that implicit in an order such as
9 this?

10 MR. HALTZMAN: Well, it's implicit it was --

11 THE COURT: You violate --

12 MR. HALTZMAN: -- an injunction order it would
13 certainly be implicit as it was entered as an order that way,
14 it would certainly be implicit in that. And that's why I
15 wanted to have the injunction order so that it would be
16 implicit that a violation was subject to both contempt and
17 the right to receive attorneys fees.

18 THE COURT: Well, if there's a violation of a court
19 order you have a right to seek both a contempt citation and
20 any other remedies that are available. I think that's
21 inherent in the issuance of an order.

22 MR. HALTZMAN: Well, based upon that oral statement
23 on the record, your Honor, I'm --

24 THE COURT: Fine.

25 MR. HALTZMAN: -- I don't think I need to have

1 anything added.

2 THE COURT: Well, there are certain hot buttons, I
3 gather, that concern the school district and we'll try to
4 avoid them if we can. And that's a no-brainer.

5 But let's go over the relief sought in the
6 stipulated order proposed by the plaintiffs. Is there any
7 objection to the first paragraph which reads: "Lower Merion
8 School District, their employees, agents, servants and
9 representatives during the pendency of this action are
10 enjoined from remotely activating any and all web cams
11 embedded in laptop computers issued to students within the
12 Lower Merion School District."

13 MR. HOCHEIMER: Your Honor, I, ultimately, enjoined
14 to me sounds like it's an injunction. I mean I'd rather it
15 say shall not but I'm not going to make a big deal of it.

16 THE COURT: Well, you're --

17 MR. HOCHEIMER: I mean semantics, I think. We had
18 proposed that those covered individuals or entities shall not
19 as opposed to they are enjoined.

20 THE COURT: Well, injunction is another hot button
21 issue. The press is in the courtroom and I guess the school
22 district wants to avoid school district enjoined from
23 whatever. But a comparable word would be prohibited.

24 MR. HOCHEIMER: That's a fine word, yes, that's
25 fine.

1 THE COURT: And I don't think it matters to the--

2 MR. HALTZMAN: It's a few more letters but that's
3 fine, yes.

4 (Laughter.)

5 THE COURT: Hopefully we'll get through this and it
6 is not an order until I get to the very end and say it's an
7 order, but what we're talking about doing now in the first
8 paragraph is substituting the word "prohibited" for the word
9 "enjoined."

10 And so it would read: "Lower Merion School District,
11 their employees, agents, servants and representatives during
12 the pendency of this action are prohibited from remotely
13 activating any and all web cams embedded in laptop computers
14 issued to students within the Lower Merion School District."

15 And, again, it's not an order until we get to the
16 end of it and I say it's an order.

17 Paragraph 2: "During the pendency of this action
18 Lower Merion School District, their employees, agents,
19 servants and representatives shall not contact any members of
20 the putative class." And the class is defined as, this is
21 the class definition in the complaint, "plaintiffs and all
22 other students, together with their parents and families, who
23 have been issued a personal laptop computer equipped with a
24 web camera by the Lower Merion School District."

25 Yes.

1 MR. HOCHEIMER: We have one concern on that. We
2 certainly agree that the covered entities and individuals
3 will not contact students, individually or collectively,
4 about the case and the issues thereof, student acts, you
5 really shouldn't, this case has no basis, you shouldn't be a
6 member of the class and try to influence them, we would not
7 do that.

8 My concern is that this case has gotten some
9 attention and parents and families of the students have
10 consistently been requesting from the school district updates
11 of what's going on. And as a result of that the school
12 district sends out district-wide e-mail updates. It goes to
13 the students or parents in the Lower Merion High School but
14 also goes to students in the middle schools and the
15 elementary schools and their families and it gives them
16 updates of what's going on. They're innocuous sort of
17 procedural updates but the school district would like -- I
18 mean these are taxpayers and they want to keep the
19 constituencies informed of what's going on here.

20 I think by doing that it would and I think Mr.
21 Haltzman agrees with us doing that but it's important that
22 we're able to continue to do that and function as a school
23 district.

24 THE COURT: Well, it's important that you continue
25 to function as a school district but in the motion for

1 temporary restraining order Mr. Haltzman avers that you're
2 providing misleading information before an investigation has
3 been undertaken or at least completed.

4 MR. HOCHEIMER: Well --

5 THE COURT: Is that a correct summary of what you've
6 said?

7 MR. HALTZMAN: The very first day the principal
8 announces over the loudspeaker to all the students that
9 basically calling my clients untruthful people and that the
10 allegations are untrue. And they never even did an
11 investigation.

12 So what I would rather be -- take place here, if
13 there's a Court order it's pretty easy for the school
14 district to say we won't be commenting on anything regarding
15 litigation because of the Court order and leave it at that.

16 I believe that the law out there dealing with,
17 you know, contacting members of the putative class says that
18 their attorneys can't do that. And all they're trying to do
19 is circumvent that law by having their clients contact my
20 clients using words, I'm sure, which are drafted by their
21 counsel nowadays and it's just not appropriate.

22 We want a fair opportunity to talk with our clients
23 not being influenced by them.

24 THE COURT: Well, that's a well taken point but by
25 the same token, on the other side of the coin, the school

1 district has had all this publicity, Friday, Saturday and
2 Sunday, and they're going to have a lot of parents, if they
3 haven't already, and Mr. Hockeimer has said they have had a
4 number of inquiries, you've got to tell us what's going on.

5 And it's one thing if you've got an individual case
6 and maybe just one client but when you've got a school
7 district loaded with parents I think maybe a middle ground is
8 appropriate.

9 MR. HALTZMAN: Well, your Honor, my parents are my
10 clients. I told them, what I suggested to him was as the
11 middle ground, and again, in other words, what a middle
12 ground would be is I asked for advanced copies of what they
13 were going to send out and if I thought there was something
14 objectionable in there I would let them know immediately and
15 if we needed to involve the Court we would. And that,
16 because I'm not looking to prevent them from sending things
17 out to the students or the parents.

18 So the middle ground that I would propose is that
19 they give me, you know, 24 hours notice of what they intend
20 to send out so that I can look at it and if I think there's
21 something objectionable in there I believe, and we've worked
22 together in other cases, we'll work something out because
23 neither one of us wants to look to create cost or expense of
24 running back to the Court to change the language around so
25 that we're satisfied.

1 THE COURT: I've utilized that device in other
2 cases. I don't know that 24-hour notice is necessary, not in
3 this era of e-mails and computer communication, but what
4 about that middle ground?

5 MR. HOCHEIMER: I think that we could work out those
6 details of timing and things like that but let's try that. I
7 mean, you're right that we are getting inundated with
8 requests and --

9 THE COURT: And you, I think, in a -- in some cases
10 it's appropriate to grant the relief that the plaintiff seeks
11 but in this case I can see a reason why a middle ground is--

12 MR. HOCHEIMER: Right, it makes it --

13 THE COURT: -- is more appropriate.

14 MR. HOCHEIMER: Peculiar tension here of the
15 obligation to taxpayers and this district's cognizant of
16 that.

17 THE COURT: Yes. Let's try to work through this
18 language. I'd like to issue an order today. And maybe what
19 we should do is keep that open and let you work that out in
20 the first instance. With me sitting up here in a courtroom
21 full of people I'm a little reluctant to start the drafting
22 exercise now.

23 My proposal -- and you might have a better idea --
24 but my proposal is that we finish going through the
25 plaintiffs' draft order and then you -- I'll use the word

1 tweak it or amend it in such a way that's agreeable and if
2 you're at loggerheads I will then -- I will then rule because
3 I'm going to try to end this hearing with an order either in
4 place or almost in place, having to be re-typed.

5 And I'm getting to the provided now. "Provided
6 however" -- this is the clause in the proposed order that
7 prohibits contact. "Provided that Lower Merion School
8 District and its employees may contact students in connection
9 with," and there are some exceptions, "educational
10 curriculum," and you can work that out. That sounds like a
11 perfectly reasonable request.

12 Is there anything in what follows that is
13 objectionable to the school district? I'm talking about
14 numbered paragraph two which carves out exceptions to the
15 absolute prohibition on school district talking to students
16 or parents?

17 MR. HOCHEIMER: There is the issue at the bottom at
18 the end of that paragraph, your Honor, it's in the middle of
19 Page 2 about the --

20 THE COURT: New software.

21 MR. HOCHEIMER: Right.

22 THE COURT: And I think there what we're going to
23 have to do is get more input from the computer specialists.

24 MR. HOCHEIMER: Well, and also more input directly
25 from the IT director at the school district because they'll

1 know what soft-- I mean I think, I'm not a technical person
2 but what I imagine is that there are routine updates and then
3 there are, you know, gosh, there's a virus going around, we
4 better put a patch out there, there's those kinds of updates.

5 But I can talk to them and work with them and try to
6 nail that down.

7 THE COURT: I think in the short run though we're
8 going to -- I'm going to issue a standstill order and I mean
9 short run. We'll decide how much additional time you need.
10 You said your forensics computer specialists are already
11 looking at the computers at the school district. I assume
12 you're talking about the school district headquarters.

13 MR. HOCHEIMER: Yeah, they're there now.

14 THE COURT: Fine. And I'm sure that the plaintiffs'
15 expert is very anxious to take a look at the computers and I
16 think it might be appropriate for the two computer experts or
17 two groups of computer experts to talk with counsel and work
18 this out.

19 But for now it is my intention to provide for no
20 changes in the computers, no new software, software updates
21 or releases and we'll keep that in place. We'll decide at
22 the end of this hearing how long that should remain in place.
23 My thought is a few days, maybe longer if the computer
24 experts need more time than that.

25 But I don't think we should freeze any updates or

1 new software that would tend to make the computers work less
2 effectively than they could and should work.

3 MR. HALTZMAN: Certainly after the next whether it's
4 three, five days after my computer experts get in there, I
5 don't want to stop anything from going to him. You know, he
6 talks about viruses, I think Mac would be, an advocate would
7 be pretty upset with him talking about all these viruses
8 because they tell you to buy a Mac because it doesn't get
9 viruses.

10 But the fact of the matter is if after this short
11 window we're able to figure out that it can't be destroyed by
12 these kind of updates we're fine with it. Right now we
13 believe that the only real evidence if it hasn't already been
14 wiped out is going to be on the computers, the students'
15 computers, not on the server.

16 THE COURT: I believe there's a way to duplicate the
17 hard drive. I don't know whether you have to duplicate the
18 entire hard drive. Is that expensive?

19 MR. HALTZMAN: Well, it's about \$300, roughly, would
20 you say, John?

21 MR. STEINBACH: In quantity the price can come down.
22 It's impractical clearly to image all 2,000 at this juncture
23 but we could certainly look for the artifacts requesting as
24 to whether the entirety or a portion thereof is imaged, both
25 are possibilities.

1 THE COURT: And could you limit that duplication
2 with the focus on the issue in question, the remote activate
3 of the webcam?

4 MR. STEINBACH: That would be our intent, to design
5 a mechanism which would facilitate an accurate and rapid
6 identification of those devices which were or were not in
7 fact activated. In order to do so we would need to perform
8 an architectural analysis of the software that's in use right
9 now and it's a very comprehensive management platform.

10 It's not just used for the purpose that we're
11 describing right now, it's used to perform all manner of
12 activities during the life cycle from the initial deployment
13 of those laptops, a progression of updates and so forth.

14 So it's enormously powerful and the type of update
15 that got pushed out could be very benign or it could do
16 things that unintentionally trample over the very data that's
17 needed in order to prove something important.

18 THE COURT: Do you have any idea how long your
19 examination --

20 MR. STEINBACH: My hope would be that we could
21 accomplish that, as Mr. Haltzman suggested, in a matter of
22 days.

23 THE COURT: Mr. Hockeimer?

24 MR. HOCKEIMER: I think the suggestion is a good one
25 that our forensic people speak to -- and I didn't get your

1 name.

2 MR. STEINBACH: Surely, my name is John Steinbach.

3 MR. HOCHEIMER: Okay. I think it would be useful
4 for our computer people to talk to Mr. Steinbach, maybe over
5 the phone tomorrow and then, as your Honor suggested, with
6 counsel present we could go over there at some point. But
7 some of the things he said I'm looking at a scope of work
8 that our guys submitted to us and they're doing those very
9 things.

10 So we're not going to hopefully duplicate efforts
11 but I think we're going to be on the same page on some of
12 these things.

13 THE COURT: Well, it would be my goal to keep the
14 expense of what has to be done to a minimum.

15 MR. HOCHEIMER: Yes.

16 THE COURT: We're talking about the plaintiff class
17 on the one hand and the school district on the other.

18 MR. HOCHEIMER: Exactly.

19 THE COURT: And you should focus on expense and do
20 what is necessary but nothing more than what is necessary and
21 if there are alternatives --

22 MR. HOCHEIMER: And it really --

23 THE COURT: -- I would utilize the least expensive
24 alternative.

25 MR. HOCHEIMER: Right. And it really is at this

1 initial stage to see what if any impact these updates would
2 have on the --

3 THE COURT: That's the first question regarding the
4 scope of injunctive relief. But for now in the order that I
5 will issue hopefully today no updates, no changes to the
6 computers until I'm assured the changes will not affect the
7 ability of the plaintiffs to do whatever testing of the
8 computers and examination of the computers is required.

9 Three, and I think there's complete agreement as to
10 three, Lower Merion School District shall preserve all
11 electronic files, data and storage media that pertain to
12 plaintiffs' claims and/or defendants' defenses, including but
13 not limited to the preservation of any and all images
14 obtained by defendants via the remote activation of web
15 cameras embedded in the laptop computers that Lower Merion
16 School District issued to high school students.

17 Is that consistent with your agreement?

18 MR. HOCKEIMER: Yes, yes, sir.

19 MR. HALTZMAN: I would just add while we drafted
20 this we have to include web cameras and what's meant to
21 include also not only the taking pictures for the webcam but
22 their getting snapshots on the screen. I don't think they
23 meant that in us going through this to exclude that. They're
24 take-- they're not only activating the webcam.

25 THE COURT: What do they call those? They're not

1 called snapshots, are they?

2 MR. STEINBACH: A screen snapshot is what it's
3 called, your Honor.

4 THE COURT: Screen? I heard --

5 MR. STEINBACH: A screen snapshot.

6 THE COURT: Screen snapshots?

7 MR. STEINBACH: Yes, sir.

8 MR. HALTZMAN: So what they're doing is at the same
9 time they're taking a picture, they're also taking a picture
10 of the screen.

11 THE COURT: Yes, I've seen those.

12 MR. HALTZMAN: Right, yes.

13 THE COURT: Not in this case but I've seen --

14 (Laughter.)

15 THE COURT: And I thought in my earlier cases they
16 referred to them as screen shots, whatever, I know what
17 you're talking about.

18 MR. HALTZMAN: Well, we'll tweak that to include
19 screen shots so that everybody's clear. I don't think that's
20 an issue for --

21 THE COURT: Four, Lower Merion School District shall
22 maintain its existing practice of taking possession of
23 laptops that are currently possessed by students with
24 appropriate authorization only at the end of the school year
25 or in the event of breakage or other technical failure or

1 other disciplinary actions, provided however that Lower
2 Merion School District shall work with its forensic
3 consultant and plaintiffs' forensic consultant and all
4 parties shall cooperate with any law enforcement authority,
5 including but not limited to the United States Department of
6 Justice, the Federal Bureau of Investigation or the
7 Montgomery County District Attorney's Office to determine a
8 means for securely preserving any potentially pertinent data
9 contained on any student's laptop and otherwise preserving
10 and maintaining a chain of custody for all evidence.

11 It's something that perhaps you'll have to get
12 together on. I know that you've provided something like that
13 in your draft order, not exactly like it.

14 MR. HOCHEIMER: There is one other issue in there
15 regarding the specific laptop currently in the possession of
16 Blake Robbins.

17 THE COURT: Oh, I read, I read that.

18 MR. HALTZMAN: Well, we've actually, believe it or
19 not, actually agreed.

20 THE COURT: You've agreed to pay the insurance fee?
21 I don't --

22 MR. HALTZMAN: We've actually agreed to a better
23 solution because there's some question as to who should get
24 it. So we have agreed that we're going to for his laptop
25 alone we're going to agree upon a third-party forensic person

1 to make the initial snapshot of his and then so we're going
2 to turn it over to that person. They're also going to
3 provide and then immediately, you know, provided that any
4 fees that may be due for getting a computer he'll get another
5 computer to use in the meantime.

6 It may only take a day to do, if it takes a week to
7 do in the meantime he'll have another computer to use.

8 THE COURT: You used the term "snapshot." Snapshot
9 is a one picture on a --

10 MR. HALTZMAN: Well, actually, the technology that's
11 actually done when they take a picture of the hard drive is
12 to take a snapshot. They don't actually copy them, they take
13 a picture of the hard drive.

14 THE COURT: Of the whole hard drive?

15 MR. HALTZMAN: Of the whole hard drive. It's
16 actually taking almost like a picture to some extent but if
17 you copy it you can make changes. But they make up what's
18 called a mirror image, almost like a picture.

19 THE COURT: Yes, that's the phrase I've heard
20 before.

21 MR. STEINBACH: I prefer to think of it as a
22 genetically identical twin.

23 THE COURT: Thank you.

24 MR. HALTZMAN: But we're actually in agreement on
25 what would be a separate paragraph as to that and we will

1 tweak that for your Honor when you send us back to -- to
2 maybe work out the language about the notice provision
3 working together before they send out announcements because
4 you wanted us to sort of try and feel them out, correct?

5 THE COURT: Yes. I propose when we finish going
6 over everything that is controversial I propose going off the
7 bench for a short time and letting you draft the changes
8 because again I think we should try to issue the order today.

9 MR. HALTZMAN: I think it should take counsel and I
10 maybe ten, fifteen minutes at the most.

11 THE COURT: I agree. With respect --

12 MR. HALTZMAN: We understand, I think we both
13 understand where your Honor's coming from, I think we both
14 understand what you'd like to see and what is appropriate in
15 this situation.

16 THE COURT: Fine.

17 MR. HALTZMAN: I think us as counsel can work
18 through that fairly quickly.

19 THE COURT: And I think the focus should be on the
20 language itself and not necessarily what we -- what we call
21 it. And I noted in -- I happened to grab one old, old
22 injunction order and it was an injunction by agreement. And
23 at the end because of the agreed-upon order the motion was,
24 the motion for temporary restraining order was withdrawn
25 without prejudice or denied without pre-- I think was

1 withdrawn without prejudice.

2 MR. HALTZMAN: Yes, I would rather have it be
3 withdrawn in light of this as opposed to any denial.

4 THE COURT: Fine. Well, I understand --

5 MR. HALTZMAN: Because I'm sure you know what that
6 would mean.

7 (Laughter.)

8 THE COURT: No, I'm, well, I'm -- "without
9 prejudice" though doesn't hurt you but the term "denial" to
10 someone who seeks relief is not welcome. No, I think we
11 ought to focus on what's absolutely necessary to protect the
12 interests of the class and at the same time recognize some
13 genuine interests of the school district. And I think we've
14 come to the point now where I can leave the bench and you
15 could draft an order that accomplishes both goals.

16 Is there anything we should do before that?

17 MR. HALTZMAN: No, your Honor.

18 MR. HOCHEIMER: Yeah, I think that's fine, your
19 Honor, thank you.

20 THE COURT: All right. My chambers is right there
21 through the door. I'll go off the bench, I'll leave you to
22 your own devices and hopefully we'll have an agreed-upon
23 order.

24 We can -- I don't know whether you've got computers,
25 we can print, we can do the order in chambers once you agree

1 on the language unless you can do it here.

2 MR. HALTZMAN: Either way, your Honor. I don't
3 think, I'm not sure I have it on my laptop so I think that we
4 can probably, based on what we've talked about, clearly mark
5 up this one draft. It will be easily read and can be then
6 transcribed.

7 THE COURT: Fine. And I think we took, I guess it
8 was in -- I talked to Mr. Levin Friday.

9 MR. LEVIN: Yes, sir.

10 THE COURT: Trying to reach agreement and failing
11 that having a hearing. We have, this morning because of some
12 misunderstanding about whether we had a hearing, I thought it
13 was best that we gather although there is essentially an
14 agreement.

15 Under the terms of the agreement I'm just going to
16 raise this issue, it doesn't seem to me that a bond is
17 necessary. If I were to issue a formal injunction under
18 Federal Rule of Civil Procedure 65 a bond would be necessary.

19 What is the position of the defense on that?

20 MR. HOCHEIMER: We do not believe a bond is
21 necessary--

22 THE COURT: Fine.

23 MR. HOCHEIMER: -- or even relevant under, if it's a
24 stipulated order.

25 THE COURT: I agree and of course the plaintiffs

1 agree.

2 (Laughter.)

3 MR. HALTZMAN: I would just ask, I think we have
4 counsel who's been hanging on the phone, I'd like to know
5 whether there's any, you know, any objection they have to
6 what's about to take place.

7 THE COURT: Mr. Walczak?

8 MR. WALCZAK: Yes, your Honor.

9 THE COURT: You've heard what we've been doing?

10 MR. WALCZAK: Yes, your Honor, I've heard most of it
11 but apparently a speaker attached to the court reporter so
12 I'm hearing a lot of keys and I'm not sure I caught
13 everything. But it certainly seems like your Honor has done
14 a comprehensive job and certainly our concerns are satisfied.

15 THE COURT: Is there anything else you wish to say,
16 Mr. Walczak?

17 MR. WALCZAK: No, your Honor, just thank you for
18 letting me participate remotely.

19 THE COURT: Well, what we're going to do is issue an
20 agreed-upon order and right now it seems as though all of the
21 issues are agreed upon but, if not, I will issue an order
22 that I think protects the rights of both the plaintiff class
23 and -- putative class and the school district.

24 I noted from your motion that you seek only leave to
25 file your amicus brief, which I have read. That means no

1 further involvement in the case, Mr. Walczak?

2 MR. WALCZAK: Your Honor, I think at this point we
3 do not believe that we will intervene but I'd like to reserve
4 the opportunity to change my mind once we see the final
5 order.

6 THE COURT: Well, there's a difference between
7 filing an amicus brief and I've granted you permission to do
8 that and intervention. And certainly you have a right to
9 seek intervention if you deem it appropriate, so I guess I've
10 granted your request.

11 (Laughter.)

12 MR. WALCZAK: Yes, thank you, your Honor.

13 THE COURT: Thank you. You may participate in these
14 proceedings, I'm afraid there will be a 15-minute wait. Or
15 if you prefer, having heard what will transpire and having
16 heard the form of order that will be issued, you may do
17 whatever it is you were doing when I called.

18 MR. WALCZAK: Thank you, your Honor. And at this
19 point we're satisfied that the matter is being well handled.
20 Thank you.

21 THE COURT: Thank you very much. Then you're
22 excused from further participation in this hearing. Thank
23 you very much, Mr. Walczak.

24 All right. I'm going to recess. Take as much time
25 as you need and tell either my deputy, George Wylesol, or my

1 electronic sound recording operator that you're ready and
2 I'll come back to the courtroom.

3 MR. HALTZMAN: Thank you, your Honor.

4 MR. HOCHEIMER: Thank you, your Honor.

5 THE COURT: You may go about your business,
6 everyone.

7 (Court in recess; 3:16 to 4:53 o'clock p.m.)

8 THE COURT: The crowd has diminished a great deal.
9 We did not want to leave you hanging. Be seated, please.

10 Counsel at my direction worked out all but a few
11 minor details of an agreement. They repaired to my chambers
12 and they now have an agreement in place. And copies will be
13 available as soon as we can make them for those of you who
14 need them.

15 There is an agreement covering what it was that
16 plaintiffs sought in their motion for emergency temporary
17 restraining order and it was signed today at 4:45 p.m. I've
18 signed the order. And, again, my deputy, George Wylesol,
19 will make copies if any of you want copies.

20 Lead counsel are in chambers now working on a
21 schedule and I don't think that's of particular interest.
22 Normally scheduling conferences are held in chambers and
23 that's what's going on now. We're talking about how much
24 time for discovery, how much time for filing motions and
25 scheduling further proceedings.

1 As soon as I see what counsel have in mind and
2 decide what is appropriate I will issue a scheduling order,
3 probably dated today, probably won't be filed until tomorrow
4 but it should be available tomorrow.

5 I don't think we need to do or say anything else.
6 Again, I didn't want to leave those of you who are still here
7 just sitting here waiting and having nothing happen. And
8 that brings you up to the minute.

9 If you have any questions I suggest that you call my
10 deputy, George Wylesol, who is as we speak making copies of
11 this order or you can call my chambers, my secretary will
12 know what's going on. I don't receive phone calls from the
13 press. I let my orders and opinions and what I say in open
14 court speak for me.

15 On that note we're adjourned and I thank you.

16 (Pause.)

17 THE COURT: The motion filed by plaintiffs for
18 emergency temporary restraining order and for permanent
19 injunction will be marked withdrawn by plaintiffs by
20 agreement in view of the separate agreement that they worked
21 out that I just signed which covers all of the relief sought
22 in the motion.

23 MR. LEVIN: That's without prejudice, your Honor?

24 THE COURT: Pardon me?

25 MR. LEVIN: That's without prejudice?

1 THE COURT: Absolutely. And it's without prejudice.

2 Thank you very much, Mr. Levin.

3 (Hearing concluded at 4:56 o'clock p.m.)

4 * * *

CERTIFICATION

I hereby certify that the foregoing is a correct transcript from the electronic sound recording of the proceedings in the above-entitled matter.

s:/Geraldine C. Laws, CET
Laws Transcription Service

Dated 3/2/10